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IN THE
Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, *Petitioner,*
v.
BELLAIRE CORPORATION, NACCO INDUSTRIES, AND NORTH AMERICAN COAL CORPORATION, *Respondents.*

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, *Petitioner,*
v.
PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL COMPANY, *Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BELLAIRE CORPORATION, NACCO INDUSTRIES, INC. AND THE NORTH AMERICAN COAL CORPORATION

THOMAS A. SMOCK
MICHAEL D. GLASS
POLITO & SMOCK, P.C.
Four Gateway Center, Ste 400
444 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 394-3333

Counsel for Respondents

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

2100

QUESTION PRESENTED

Under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.*, Congress established a two-stage system for funding the health-care benefits of retired coal miners and their dependents. In accordance with the initial stage, Congress directed the Commissioner of the Social Security Administration to assign miners to responsible coal operators by October 1, 1993, and thereafter required those coal operators to begin paying premiums to the United Mine Workers of America Combined Benefit Fund for this initial category of beneficiaries. In accordance with the second stage, Congress provided that unassigned beneficiaries would receive full benefits through a separate funding mechanism that could draw upon, among other potential resources, premiums collected from all assigned operators on a *pro rata* basis.

The question presented is this: When the Act expressly provides that the Commissioner "shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator" and when the Act expressly establishes a separate funding mechanism providing full benefits for all other miners and their dependents, may the Commissioner continue to make initial assignments after October 1, 1993 and as late as 1998?

PARTIES TO THE PROCEEDING

Respondents Bellaire Corporation and The North American Coal Corporation are subsidiaries or affiliates of respondent NACCO Industries, Inc., a publicly-held corporation. NACCO Industries itself has no publicly-held subsidiaries or affiliates. This brief refers to the three respondents collectively as "the Bellaire Group."

The petition filed by Jo Anne B. Barnhart consolidates the Bellaire Group's case with that of Peabody Coal Company and Eastern Associated Coal Company, parties that are not affiliated with the Bellaire Group.

The petition of Michael H. Holland and the other Trustees of the United Mine Workers Combined Benefit Fund includes only the Bellaire Group as respondents, as the lower courts denied these petitioners leave to intervene in the Peabody Coal and Eastern Associated Coal action.

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BRIEF IN OPPOSITION FOR RESPONDENTS BELLAIRE CORPORATION, NACCO INDUSTRIES, INC. AND THE NORTH AMERICAN COAL CORPORATION

Respondents Bellaire Corporation, Nacco Industries, Inc. and the North American Coal Corporation (collectively, "the Bellaire Group") respectfully submit this combined brief in opposition to the petition filed in No. 01-705 by the Commissioner of Social Security and to the petition filed in No. 01-715 by Michael H. Holland and other trustees of the United Mine Workers of American Combined Benefit Fund.

STATEMENT

In enacting the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.*, Congress established a series of funding mechanisms that would provide health and disability benefits for former coal miners and their dependents. One innovation of the Act stemmed from its two-stage system for funding benefits.

Under the first funding stage, the Act requires the Commissioner of Social Security to "assign" miners (and their dependents) to the coal operators for whom they worked. The assigned operators then pay premiums to the United Mine Workers of America Combined Benefit Fund for the health-care benefits of this first category of beneficiaries. Under the second stage, the Act requires the Commissioner to establish a separate funding mechanism for all other miners and their dependents, which draws resources from, among other funds, "unassigned" beneficiary premiums collected from all assigned operators on a *pro rata* basis. *See* 26 U.S.C. §§ 9704 and 9705.

In October 1992, Congress set this bifurcated system in motion with a series of deadlines, the most important of which required the Commissioner to make all first-level assignments by October 1, 1993. "[T]he Commissioner of Social Security shall," the Coal Act unequivocally states, "assign each coal industry retiree who is an eligible beneficiary" to a signatory

operator if one can be found "before October 1, 1993." 26 U.S.C. § 9706(a).

More than two years ago, the Sixth Circuit treated the October 1, 1993 deadline as the lynchpin of "the entire scheme for calculation of premiums of the assignments made as of that date." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1063 (1999). Later decisions in that court and elsewhere agreed. Under each of these rulings, beneficiaries whom the Commissioner did not assign as of October 1, 1993 were not deprived of benefits. They simply received their benefits from the unassigned pool, just as the two-stage funding system contemplated.

The Commissioner and the Trustees of the Combined Benefit Fund have been less than accepting of these decisions. Both within the Sixth Circuit and without, they have continued to litigate the point at every turn. Now that this strategy has been rewarded with a favorable outcome in the Fourth Circuit, the Commissioner and Trustees promptly claim that certiorari is warranted. But because this modest division of authority is insufficiently deep or mature to warrant review and because no coal miner or dependent will lose a single benefit while other courts look at this interpretive issue, the Court should deny the writ. Further percolation of the issue not only may eliminate this division of authority eventually, but at a minimum it will provide other lower courts with an opportunity to weigh in on, and contribute to the resolution of, this question.

I. FACTUAL HISTORY

Between the Coal Act's effective date of October 24, 1992 and October 1, 1993, the Commissioner assigned the Bellaire Group responsibility to pay premiums for more than 1,000 Coal Act beneficiaries. While the Bellaire Group has challenged a discrete number of those assignments on grounds ranging from misidentification to unconstitutional-reachback under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the

vast majority of these initial assignments remain undisputed and all premiums on them have been paid. The Bellaire Group also remains exposed to the potential obligation to make *pro rata* "unassigned beneficiary premiums" in the event a fiscal need to require such second-stage premiums ever arises.

At issue in this case are 270 miners whom the Commissioner tried to assign to the Bellaire Group from the unassigned miner pool and most notably tried to assign after October 1, 1993. The Commissioner assigned just a handful of this group—41 miners in all—to the Bellaire Group in calendar year 1993. The overwhelming majority were assigned after the Commissioner took a one-and-a-half year hiatus from making initial assignments. The Commissioner thus assigned a majority of the 270 miners in 1996, and made some assignments as late as 1998. Nonetheless, according to the Commissioner, the Bellaire Group owes premiums on all 270 miners from 1993 to the present.

The Bellaire Group has paid $4,042,510.56 in premiums on those assignees to date and, were it not for injunctive relief in the district court, would owe approximately $40,000 per month in premium payments into the future.

II. PROCEDURAL HISTORY

On June 30, 2000, the district court entered a final judgment in favor of the Bellaire Group, voiding each of the 270 assignments that the Commissioner attempted to make after the October 1, 1993 deadline. The Sixth Circuit has refused the Government's and Trustees' invitation to alter that ruling on three separate occasions—once by rejecting a motion for preliminary *en banc* review, then by ruling against petitioners in its panel decision, and lastly by rejecting a subsequent motion for *en banc* review.

After three separate motions for an extension of time, petitioners filed these two petitions for a writ of certiorari. Both petitions were filed just a month after the Fourth Circuit

entered its decision in *Holland v. Pardee Coal Co.*, 269 F.3d 424 (4th Cir. 2001).

REASONS FOR DENYING THE WRIT

Now that the Fourth Circuit has created what Judge Niemeyer criticized in dissent as an "unnecessary" conflict with the Sixth Circuit, *Pardee Coal*, 269 F.3d at 439, the Commissioner and Trustees claim that this discrete Coal Act question suddenly warrants review. In their haste, however, they overlook the shallow nature of the division of authority, to say nothing of the possibility that pending cases will give the Fourth and Sixth Circuits additional opportunities for *en banc* review and that pending cases within the D.C. and Third Circuits will give those courts an opportunity to consider the issue. Now is not the time and this is not the case to review this question.

I. THIS SHALLOW DIVISION OF AUTHORITY DOES NOT WARRANT REVIEW.

While the nascent conflict between *Dixie Fuel* and *Pardee Coal* is real, it falls well below the Court's traditional requirements for granting review. As an initial matter, *Pardee Coal* is now barely two months old, and several pending district court cases will give the Fourth Circuit additional opportunities to grant *en banc* review of this 2-1 decision. There is in short ample reason to believe that the split will not last long.

But even if *Pardee Coal* survives, other opportunities assuredly will arise for the Court to look at the question. In the Third Circuit, a similar § 9706(a) issue is pending in *Shenango, Inc. v. Commissioner of Social Security*, No. 00-2525. In the Sixth Circuit, the same question is pending in *Mead Corp. v. Halter*, No. 01-3277. And in the Fourth Circuit, as noted, multiple district-level cases are percolating on the issue, *see, e.g., Pratt Mining Co. v. Barnhart*, CA:00-0856 (S.D. W.Va.), as is true in the D.C. Circuit, *see Nell Jean*

Indus., Inc. v. Barnhardt, No. 01-CV-2006 (D.D.C.) and *Elgin Nat'l Indus. v. Halter*, No. 01-CV-397 (D.D.C.). Because the Commissioner and Trustees thus far have chosen to litigate this Coal Act issue at every opportunity, it is a virtual certainty that they will present the Court with additional petitions raising this question—assuming the division of authority does not dissipate over time.

Nor may the Commissioner sidestep this deficiency in her petition by contending (Pet. 23-24) that the most important lower courts have voiced their opinions. True enough, significant "extractive bituminous coal mining" occurs in the States within the Sixth and Fourth Circuits. But it is also true that Alabama, Utah, Pennsylvania and other States (from other circuits) have substantial operations as well. Indeed, as the Trustees themselves acknowledge (Pet. 4), the Coal Act has generated appellate opinions from coast to coast. *See, e.g., Eastern Enter. v. Apfel*, 524 U.S. 498 (1998) (arising out of the First Circuit); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996). *See also In re Sunnyside Coal Co.*, 146 F.3d 1273 (10th Cir. 1998); *Nat'l Coal Ass'n v. Chater*, 81 F.3d 1077 (11th Cir. 1996); *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819 (D.C. Cir. 2001). The Court has not traditionally reviewed divisions of authority involving just two appellate courts, and there is no compelling reason why it should do so here.

Even less availing is the Trustees' fear (Pet. 18-19) that coal operators "will concentrate their litigation efforts" in the Sixth Circuit. Certainly, coal operators may do so. But federal law still requires proper jurisdiction and venue, *see* 29 U.S.C. § 1451 and 26 U.S.C. § 9721, and even the Commissioner tacitly concedes (Pet. 23-24) that many operators are unlikely to establish any basis for Sixth Circuit

review. In the end, if the issue carries the magnitude that petitioners jointly assert, it undoubtedly will reach more appellate courts in the next several years.

II. THE LOWER COURT CORRECTLY RESOLVED THE QUESTION ON THE MERITS.

A. The Text Of The Coal Act Supports The Sixth Circuit's Interpretation.

Besides involving a two-court circuit split that is barely two months old, the petition should also be denied because the Sixth Circuit faithfully adhered to the express language and explicit two-stage funding structure that Congress established in passing the Coal Act. This, too, counsels against review.

In creating this two-stage funding scheme, Congress in no uncertain terms directed the Commissioner to act at once:

> For purposes of this chapter, the Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator....

26 U.S.C. § 9706(a) (emphasis added). In a prior decision involving this identical issue, the Sixth Circuit construed this language to mean that "[t]he October 1, 1993 date is a deadline" and that the Coal Act "does not permit the SSA to make such assignments after that date." *Dixie Fuel*, 171 F.3d at 1064. And it supported that decision by pointing to the funding provisions for miners who were not assigned by the October 1, 1993 deadline. *Id.* at 1062. Relying on *Dixie Fuel*, the Sixth Circuit applied the same reasoning to the Commissioner's and Trustees' arguments here.

Not just *stare decisis,* but basic principles of statutory construction, required the Sixth Circuit to do exactly that. When a statute is clear and unambiguous, the Court has reminded litigants, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842

(1984). That rule has special application when Congress uses the directive "shall," which generally imposes mandatory duties on the regulated entity, and when Congress provides consequences for failing to satisfy the imposed duty. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 607 (1989) (observing that "Congress could not have chosen stronger words" than "'shall order' the forfeiture" to "express its intent that forfeiture be mandatory"); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'the language of command.'") (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

Applied here, these precedents and the common-sense reasoning behind them support the Sixth Circuit's decision. The National Legislature's unyielding language could not have been more straightforward. The statute required the Commissioner to make initial assignments by October 1, 1993, plain and simple. Nor was the "shall" directive in the Act without consequence. The Act explicitly provides a funding mechanism for miners and their dependents not covered by these initial assignments, which includes authority to impose "unassigned" beneficiary premiums on coal operators. A two-stage funding mechanism makes little sense if the initial funding determination never ends.

Against this backdrop, petitioners' three grounds for reading "shall" in § 9706(a) as an exhortation rather than a command are more wishful than real. Their first argument—that the Sixth Circuit lacked jurisdiction even to decide *Dixie Fuel* in 1999 (*see* U.S. Pet. 12, n.8 and Trustee Pet. 19-20)—is the least persuasive of all. Even aside from the fact that the Commissioner chose not to seek review of *Dixie Fuel* on this ground or any other, the Sixth Circuit's reaffirmance of *Dixie Fuel* in this case by itself defeats the point.

Petitioners next rely (U.S. Pet. 16, Trustee Pet. 21-23) on *Brock v. Pierce County*, 476 U.S. 253 (1986), *United States v.*

Montalvo-Murillo, 495 U.S. 711 (1990), *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993), and *Regions Hosp. v. Shalala*, 522 U.S. 448 (1998), to support their claim. But this argument fares no better.

Regions Hospital, as an initial matter, did not involve a deadline at all. Unlike other parts of the Medicare Act, the applicable provision was "silent on the matter of time," *id.* at 459, leading *Regions Hospital* sensibly to hold that the Secretary of Health and Human Services could correct prior miscalculations after the fact. *Id.*

Nor do *Brock*, *Montalvo-Murillo* or *James Daniel* involve efforts to read "shall" in a non-mandatory way. The core issue in each of those cases was how to determine "the consequences of a failure to" comply with a statutory deadline when the statute fails to suggest what that consequence should be. *See, e.g., Brock*, 476 U.S. at 259. In *Montalvo-Murillo*, for example, the Court considered whether the government's failure to complete a detention hearing on a person's "first appearance" before a judicial officer "requires the release" of the suspect. *Id.*, 495 U.S. at 717. Because Congress provided no statutory consequence for failing to meet the deadline, the Court refused to "invent a remedy" outside of the statutory scheme. *Id.* at 721. *James Daniel* followed the same path in the context of a civil forfeiture statute, reasoning that where "Congress [fails] to specify a consequence for noncompliance," the Court would not infer a remedy of dismissal. 510 U.S. at 64-65.

Brock comes to the same conclusion. At issue was the Comprehensive Employment and Training Act, which empowered the Secretary of Labor to investigate complaints and audits regarding the alleged misuse of CETA funds, and which provided that the Secretary "'shall' determine 'the truth of the allegation or belief involved, not later than 120 days after receiving the complaint.'" *Brock*, 476 U.S. at 256. The statute, however, did not identify any consequences for the

Secretary's failure to meet that 120-day deadline. *Id.* at 259. Under these circumstances, *Brock* refused to hold that the inability to meet the 120-day deadline meant that the agency should "lose . . . enforcement power" altogether, creating an enforcement vacuum. *Id.* at 266.

Yet no such vacuum and no such set of statutory inferences exist here. Contrary to the Commissioner's claim (Pet. 17) that the Coal Act fails to establish any "consequence" for unmade assignments, the Act's two-stage assignment scheme is tailored precisely to handle that contingency. It places those beneficiaries whom the Commissioner fails to assign by October 1, 1993 into the unassigned miner pool; it does not provide that these beneficiaries must wait to go into the unassigned pool until the Commissioner decides—one, two, even five, years later—to make further assignments. A similar conclusion follows from the specific funding mechanisms established by the Coal Act for this group of unassigned beneficiaries. The Act separately funds these health-care benefits by (1) transfers from the overfunded 1950 UMWA Pension Plan; (2) transfers of interest from the corpus of the Abandoned Mine Land Trust ("AML"); and, if necessary, (3) "unassigned" beneficiary premiums collected from all assigned operators on a *pro rata* basis. 26 U.S.C. §§ 9704 and 9705.

In this statutory context, petitioners' reliance on *Brock*, *James Daniel Good*, *Montalvo-Murillo* and *Regions Hospital* ultimately gives analogy a bad name. The Coal Act's explicit "shall" directive, together with its provisions for funding benefits for miners that are not included in these initial assignments, represents a far cry from the statutes at issue in these decisions.

Lastly, these same congressionally-enacted funding mechanisms undermine petitioners' concerns (U.S. Pet. 18-19, Trustee Pet. 16-17) about the solvency of the AML fund and the payment obligations of "other, private parties." If

Congress did not want interest from the AML fund to be used to pay for the health-care benefits of unassigned miners, it would not have created a statute that mandated it, much less made this funding mechanism a prominent source of revenue. And as for "private parties"? One of them is the Bellaire Group itself, which stands prepared to pay its full *pro rata* share for benefits that must be provided to this group of miners and their dependents.

Not one of petitioners' three arguments, then, shows that the Sixth Circuit erred. At the same time, moreover, neither petitioner offers any tenable explanation why Congress would establish an October 1, 1993 deadline if the deadline were in the end utterly meaningless. Less than two months ago, the Court reaffirmed the time-respected canon against such constructions: "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)). Yet the petitioners' reading would render "by October 1, 1993" purposeless and irrelevant. Their interpretation fails on this independent ground as well.

B. The Structure Of The Coal Act Supports The Sixth Circuit's Interpretation.

Nor can petitioners' collective effort to read the October 1, 1993 deadline out of the Coal Act be justified by the Act as a whole. The structure and organization of the Act turn on a series of express deadlines and key dates. As even a cursory reading of the Act reveals, these deadlines are anything but casual:

— Coal Act beneficiaries are limited to miners and dependents already enrolled in and receiving benefits from the 1950 or 1974 United Mine Workers Association benefit plans "as of July 20, 1992." 26 U.S.C. § 9703(e).

— The 1950 and 1974 UMWA benefit plans had to provide, "where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary" no later than October 1, 1992 or the 20th day after the enactment date. 26 U.S.C. § 9706(c).

— The Trustees of the new benefit plan had to be designated "as soon as practicable (but not later than 60 days) after the enactment date." 26 U.S.C. § 9702(a)(1).

— The Trustees "shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the [Commissioner] may require to compute any premium under this section." 26 U.S.C. § 9704(h).

— The 1950 and 1974 UMWA benefit plans had to merge by February 1, 1993. 26 U.S.C. § 9702(a)(2).

— The Combined Fund became the source of all benefits as of February 1, 1993. 26 U.S.C. §§ 9703(b)(4) and (c)(1).

And as to this dispute, the following deadlines are inextricably bound up with the requirement that final assignments be made by October 1, 1993:

— The first "plan year" runs from February 1, 1993 to September 30, 1993. 26 U.S.C. § 9702(c).

— Coal operators' premiums for unassigned beneficiaries are calculated as of the October 1, 1993 deadline. 26 U.S.C. § 9704(f).

— The first premiums are due on October 25, 1993—three weeks after the assignment deadline. 26 U.S.C. § 9704(g).

From beginning to end, the Coal Act is a comprehensive and time-based scheme that values predictability and certainty. The Act relies on specific and pre-identified dates designed to establish stability where there once had been chaotic plan administration.

C. Petitioner's Predecessor Agreed.

One last merits point deserves a brief rebuttal. In addition to the above arguments, the Commissioner relies (Pet. nn. 5, 6, 7, 19 and 20) on legislative history from committee and subcommittee proceedings after the Coal Act became law. As an initial matter, such "history" is unreliable at best, as post-enactment views generally '"form a hazardous basis for inferring the intent' behind a statute." *Monsanto*, 491 U.S. at 610 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

But even if one does consider post-enactment commentaries or the financial analysis offered by hindsight, that view fails the Commissioner as well. In one post-enactment committee hearing, for example, Petitioner's predecessor, Acting Commissioner Lawrence H. Thompson, acknowledged that he was on a deadline in making his initial assignments:

> I am also happy to report that we are making good progress and fully expect to meet the *statutory due date* for carrying out our assigned tasks under the Act.

Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing on Serial 103-59 Before the House Committee on Ways and Means, 103rd Cong., September 9, 1993 (Committee Print 1994) at 21-26 (emphasis added). That same day—just 21 days before October 1, 1993—Mr. Thompson concluded with an express description of what would become the lower court's position here:

> In conclusion, I want to stress that SSA is working hard to fulfill its responsibilities under the Coal Act. I am pleased to report that SSA is making excellent progress with the assignment process. To date we have completed about 40 percent of the assignments. *We fully expect that we will meet our statutory responsibility to calculate the amount of the health benefit premium due for each beneficiary and complete the assignment process by October 1, 1993.*

Id. at 26 (emphasis added). And two years later, Mr. Thompson returned to Congress as Principal Deputy Commissioner to report success: "SSA completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *Coal Industry Retiree Health Benefit Act of 1992: Hearing on Serial 104-67 Before the Subcomm. On Oversight of the House Comm. On Ways and Means*, 104th Cong. 22-23 (1995). Of course, this testimony only reflected the Commissioner's actual practice; he stopped making assignments in October 1993, and this litigation was not triggered until the new Commissioner unexpectedly resumed making original assignments in June 1995.

What was true when the Commissioner testified in 1993, however, remains true now. The straightforward words of the provision allow but one conclusion: The Coal Act's explicit October 1, 1993 deadline is in design ("shall") and in effect (*see* prior views of the Commissioner) mandatory. Even if error correction were a traditional ground for seeking review in this Court, which it is not, no interpretive errors occurred here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

THOMAS A. SMOCK
MICHAEL D. GLASS
POLITO & SMOCK, P.C.
Four Gateway Center
Suite 400
444 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 394-3333

Counsel for Respondents Bellaire Corporation, NACCO Industries, Inc. and the North American Coal Corporation